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Supreme Court, U.S.
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No. 01-1853

In The
Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF
MARSHALL G. GARDINER, DECEASED

J'NOEL GARDINER, PH.D.,

Petitioner,

v.

JOSEPH M. GARDINER, III,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Kansas

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent's Brief in Opposition ("Opp.") either concedes, or fails to dispute, the principal arguments made in Dr. Gardiner's Petition for Certiorari ("Pet."). And the arguments Respondent *does* raise are unpersuasive. Certiorari should be granted.

1. As the Petition explains, this Court has never addressed whether, or to what extent, non-adjudicatory State administrative determinations are "Records" entitled to full faith and credit. Pet. 15-16. Respondent essentially concedes this – in his words, "[t]he precedent which has previously been laid down from this court differentiates the credit owed to laws (legislative measures and common law) and to judgments when it comes to the application of the full faith and credit clause of the United States Constitution." Opp. 9. But this is precisely Dr. Gardiner's point – the status of non-judicial Executive-branch actions is an open question in this Court, is squarely presented by the Petition, and warrants review.[1]

Respondent does not challenge the other central arguments made in the Petition. Thus, Respondent does not deny that the lower courts are divided on the question whether non-judicial records are entitled to full faith and credit outside the issuing State and, if so, in what degree. Pet. 17-19 & nn.5-8. In particular, the lower courts disagree whether the forum's public policy can justify

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[1] Since this Court has never addressed this issue, a ruling in Dr. Gardiner's favor would not require the Court to "remove and vacate" or "abandon[ ]" its prior full faith and credit jurisprudence, as Respondent claims. Opp. 10-11, 20.

disregarding the actions of another State's Executive – a significant disagreement, given that a State's "public policy" is often discernible only in the eye of the beholder.

In her Petition, Dr. Gardiner also argued that the Question Presented is important, for a number of reasons: the ubiquity of administrative-agency actions as a source of legal rights and obligations; the need for certainty with respect to vital records in particular; and the confused legal status of transsexuals, which fully 21 States have sought to clarify by enacting laws, like Wisconsin's, which permit the amendment of the sex designation in birth records. Pet. 17, 21-25. Respondent does not respond, even though these arguments were the centerpiece of the Petition.

2. Rather than responding to the Petition, Respondent raises a series of virtually frivolous objections. First, Respondent argues that the denial of certiorari in *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Civ. App. 1999), *cert. denied*, 531 U.S. 872 (2000), somehow bars the present Petition, since Dr. Gardiner supposedly has failed to justify "this Court [ ] reconsider[ing] its previous decision not to grant a Writ of Certiorari" in *Littleton*. Opp. 5.

Respondent's argument is doubly flawed. First, "[o]f course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995), quoting *United States v. Carver*, 260 U.S. 482, 490 (1923). Indeed, this Court has held that the denial of certiorari is not preclusive *even as between the parties themselves*. *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973) (denial of certiorari to review interlocutory ruling does not preclude grant of

certiorari after final judgment). The denial of certiorari in *Littleton* is irrelevant here; Dr. Gardiner need not justify the "reconsider[ation]" of that action.

Equally devastating to Respondent's argument, however, is that *this case presents a different issue from Littleton*. While *Littleton* also involved the validity of a transsexual's marriage, in *Littleton* the transsexual was born in Texas, the same State later asked to determine the validity of her marriage. *Littleton* held that the transsexual's attempt to change the sex designation in her original Texas birth certificate was ineffective under Texas law, which (unlike Wis. Stat. § 69.15(4)(b)) only permits such an amendment where the original record "is incomplete or proved by satisfactory evidence to be inaccurate." Tex. Health & Safety Code Ann. § 191.028, discussed at 9 S.W.3d at 231. Thus, to the extent *Littleton* refused to give effect to an amended birth certificate, it did so as a matter of *State* – not constitutional – law. *Littleton* thus did not raise "the very issues raised in [Dr. Gardiner's] Petition," as Respondent contends. Opp. 5. Moreover, even a brief comparison shows that Respondent's claim that Dr. Gardiner raises "no new issues or arguments" than those presented in *Littleton* is blatantly false. *Compare* Pet. 14-26 *with* Respondent's App. 13-15.

3. The Brief in Opposition also relies on Wis. Stat. § 69.21(1)(c), which permits the courts to determine the "evidentiary value" of "a vital record which has been amended." According to Respondent, this provision "opened the door to the reviewing state to make an independent decision as to whether or not the new birth certificate would violate the public policy of the reviewing state." Opp. 7.

But Wis. Stat. § 69.21(1)(c) cannot justify the lower court's ruling. Notably (and unlike the Court of Appeals, *see* Pet. App. 90a-91a), the Kansas Supreme Court did not invoke § 69.21(1)(c) to justify its decision. Rather, as Respondent acknowledges (Opp. ii, 7), the Kansas Supreme Court relied on its view of Kansas public policy, not the "evidentiary value" of the Wisconsin record. Respondent cannot justify the denial of certiorari on a rationale the Kansas Supreme Court never adopted.

In any event, § 69.21(1)(c) does not give reviewing courts free reign to reject amended vital records willy-nilly. The statutory reference to a determination of "evidentiary value" does not authorize consideration of the forum's public policy. Under Respondent's reading of § 69.21(1)(c), that provision would completely nullify Wis. Stat. § 69.15(4)(b), and render it meaningless, since it would allow a court, in every instance where a transsexual's sex was in question, to choose to disregard an amended birth certificate for no reason other than simple disagreement with its contents. Section 69.21(1)(c) cannot be twisted to justify the Kansas Supreme Court's decision.

Properly construed, § 69.21(1)(c) only permits a reviewing court to inquire into the *factual accuracy* of a vital record (for example, whether Dr. Gardiner had in fact undergone "a surgical sex change procedure" justifying amendment to her birth certificate under Wis. Stat. § 69.15(4)(b)). *See* Pet. 28-29. This is all the court did in the Wisconsin case Respondent cites. *See Lubnor v. Peerless Ins. Co.*, 19 Wis.2d 364, 372, 120 N.W.2d 54, 58 (1963) (cause of death reported by non-physician in death certificate "rebutted * * * [by] the competent medical evidence in the case"). Federal trial courts have applied similar State statutes in the same way, asking only whether other

evidence proves the factual inaccuracy of an amended vital record. *See* Pet. 28-29 n.19 (citing cases). Yet the Kansas Supreme Court engaged in no such inquiry: it did not dispute the correctness of Dr. Gardiner's amended birth certificate under Wisconsin law, but instead expressed its policy disagreement with Wisconsin law itself. The Kansas Supreme Court did not act under Wis. Stat. § 69.21(1)(c).

4. Respondent next argues that Dr. Gardiner's amended birth certificate was "merely a ministerial act" which "changed the wording of [Dr. Gardiner's] birth certificate." Opp. 11-12. But Respondent ignores that, by permitting the amendment of birth records, Wisconsin and the 20 other States with similar laws clearly intended those amended records to have legal significance – namely, to change the legally recognized sex designation of the relevant individual. The lower court's decision denies Wisconsin's action this effect.

5. Respondent's reliance on the fact that neither Respondent, nor the State of Kansas, were parties to the Wisconsin proceeding (Opp. 3, 15-16) is likewise irrelevant. While it is premature to get into a full debate on the merits, this Court has never held that the full faith and credit command applies only to persons who were parties, or in privity with parties, to an earlier proceeding. To the contrary, this Court has expressly held that a "status" determination like Dr. Gardiner's amended sex designation must be recognized in other States, *even as against non-parties*, since such status determinations are meaningless unless universally recognized. *Williams v. North Carolina*, 317 U.S. 287, 297-98 (1942) (*ex parte* Nevada divorce preclusive against State of North Carolina in later bigamy prosecution).

6. Respondent also apparently argues that Dr. Gardiner's full faith and credit argument is foreclosed because Congress intentionally did not address it when enacting the Defense of Marriage Act, 28 U.S.C. § 1738C. Opp. 17-19. Respondent cites no authority for his claim (Opp. 18) that Congress was "reluctant" to address that issue. But even if it were true, Respondent's argument is puzzling – the Defense of Marriage Act deals with the recognition due foreign-state marriages, *not* birth records, and creates an *exception* to the States' full faith and credit obligations. Respondent does not explain why Congress' failure to foreclose Dr. Gardiner's constitutional claim somehow prejudices her rights.

Respondent then makes the following startling claim:

> [I]t is the Congress of the United States which is tasked under Article 4, Clause 1 with the authority to prescribe the manner in which acts, records and proceedings shall be given full faith and credit among the various states. The novel approach of the Petition is that * * * this Court should * * * render[ ] a decision legislative in nature, that the legislative branch of the government, the Congress assembled, has specifically declined to do. This is not the traditional role of the United States Supreme Court.

Opp. 19.

It is difficult to know what Respondent means to argue in this passage. But to the extent he is arguing that the courts may only apply the Full Faith and Credit Clause in circumstances where Congress has passed implementing legislation, that argument suffers from (at least) two fatal flaws. First, in 1804 Congress enacted a statute explicitly requiring each State to give full faith and

credit to the non-judicial records of other States. *See* Pet. 14-15 (quoting Act of March 27, 1804, ch. 56, 2 Stat. 298, 298-99 (present version at 28 U.S.C. § 1739)). If an implementing statute is necessary, one exists here.

Second, "it is quite clear that Congress' power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by the implementing legislation." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272-73 n.18 (1980) (plurality opinion); *see also, e.g.*, *Hughes v. Fetter*, 341 U.S. 609, 613-14 n.16 (1951) (requiring Wisconsin to allow suit under Illinois wrongful death statute, even though 28 U.S.C. § 1738 at that time did not require full faith and credit for State statutes); *Bradford Elec. Co. v. Clapper*, 286 U.S. 145, 154-55 (1932) (same). Thus, whether Congress has enacted a statute requiring recognition of Dr. Gardiner's amended birth certificate is irrelevant; this Court can apply the Full Faith and Credit Clause with or without implementing legislation.[2]

7. Respondent's Brief in Opposition makes an assortment of additional arguments, none of which merit extended discussion.

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[2] Respondent's argument that the Defense of Marriage Act would have authorized a Kansas court to disregard Dr. Gardiner's marriage, if she had been married in another State, Opp. 17-18, likewise misses the mark. The Defense of Marriage Act provides that a State need not recognize a marriage "between persons of the same sex," without establishing any criteria by which a person's sex shall be determined. 28 U.S.C. § 1738C. If Dr. Gardiner's full faith and credit argument is accepted, the Defense of Marriage Act is irrelevant, since she and her deceased husband were *not* "of the same sex."

Mysteriously, Respondent seeks to attach significance to the fact that "Wisconsin courts have never passed on the validity" of Wis. Stat. § 69.15(4)(b). Opp. 4. Yet Respondent does not now suggest, and did not suggest below, any conceivable basis for holding that statute invalid. It is downright silly for Respondent to suggest that this Court should regard § 69.15(4)(b) as of dubious constitutionality when no one – least of all Respondent – has sought to challenge it.

Respondent also suggests that certain failed measures offered in the Wisconsin legislature, seeking to "define[ ] marriage as being between one man and one woman," somehow show that "the entire issue [of a transsexual's sex designation] is unresolved in Wisconsin." Opp. 4 & n.5. But Respondent does not claim that these measures defined a "woman" so as to exclude a transsexual who has obtained an amended birth certificate under Wis. Stat. § 69.15(4)(b). From all that appears, these unenacted bills are fully consistent with Dr. Gardiner's position. In any event, these failed proposals shed no light on the straightforward meaning of Wis. Stat. § 69.15(4)(b) – to change a post-operative transsexual's sex designation in the eyes of the law. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute'"; citation omitted).

Respondent also describes at length the facts purportedly showing the existence of a premarital agreement between Dr. Gardiner and her deceased husband, by which Respondent claims Dr. Gardiner waived her right to a share of Marshall Gardiner's estate. Opp. 1-2. But the Kansas District Court rejected Respondent's motion for

summary judgment on this issue, Pet. App. 100a-102a, and both the Kansas Court of Appeals and the Supreme Court refused to even consider it, because Respondent failed to cross-appeal. Pet. App. 7a, 92a. Respondent's discussion of these extraneous facts is simply an attempt to distract this Court from the issue actually before it.[3]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 6, 2002

[3] Lest the Court be misled, Dr. Gardiner notes that the arguments Respondent ascribes to her in his Brief in Opposition (at 16-17, 20), do not represent statements made by Dr. Gardiner or her counsel, although they are indented in a style normally reserved for direct quotations.